No. 79-796

In the Supreme Court of the United States

OCTOBER TERM, 1979

AMAREX, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

ROBERT R. NORDHAUS
General Counsel

JEROME M. FEIT
JOSHUA Z. ROKACH
Attorneys
Federal Energy Regulatory Commission
Washington, D.C. 20426

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-796

AMAREX, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10) is reported at 603 F.2d 127. The opinions and orders of the Federal Energy Regulatory Commission (then the Federal Power Commission) (Pet. Apps. B, C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1979. A petition for rehearing was denied on August 27, 1979. The petition for a writ of certiorari was filed on November 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the sale in interstate commerce of gas from one field covered by a small producer certificate of unlimited duration and an underlying gas purchase contract, resulted in the dedication to interstate commerce of gas reserves from another field that was also covered by the certificate and the contract.

STATUTE INVOLVED

Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

STATEMENT

1. In 1967, certain acreage in Oklahoma became the subject of an oil and gas lease (the "1967 lease"), which, by its terms, was to expire in September 1972. In January 1970, petitioner, Amarex, Inc., acquired the lease by assignment. In June 1970, petitioner contracted with respondent Arkansas Louisiana Gas Company ("Arkla") to sell it natural gas obtained from property covered by the "1967 lease" and other "contract leases" then held by petitioner.[1]

Because this contract involved the sale of gas in interstate commerce, petitioner applied to the Commission for a small producer certificate of public convenience and necessity, as required by the Natural Gas Act, 15 U.S.C. 717, and Commission regulations, 18 C.F.R. 157.40. On August 12, 1971, the Commission granted the application authorizing "the sale * * * of natural gas in interstate commerce * * * as * * * described in the application[] [for a certificate]" (Pet. App. C-5). This was "a blanket certificate of 'unlimited duration' covering all of [petitioner's] sales and service in interstate commerce" (Pet. App. A-3; footnote omitted).

In 1971, pursuant to the certificate and the 1970 gas purchase contract, petitioner sold gas to Arkla from properties other than those covered by the "1967 lease." The land covered by that lease remained un-

---

[1] The relevant terms of petitioner's 1970 contract with Arkla are detailed in the opinion of the court of appeals (Pet. App. A-2 to A-3).

developed until expiration of the lease in September 1972; petitioner, however, reacquired its leasehold interest earlier that same year from the original lessor. As a result of subsequent exploration, natural gas was ultimately discovered on this property and, by "August 1975, a commercially productive gas well was completed * * *" (Pet. App. A-4).

2. When petitioner refused to comply with Arkla's request that it deliver gas produced from that well, Arkla filed a complaint with the Commission requesting that it order delivery. Upon review of the certificate and the underlying contract, the Commission ruled in Arkla's favor, concluding that these documents contained no "limitation in the duration of any part of the certificated service" from the acreage involved, including the property covered by the 1967 lease (Pet. App. C-14 to C-15). The Commission took the view that "commencement of [certificated] service from any of the acreage described in a gas purchase contract commits all of the acreage described therein to the service * * *" (*id.* at C-17). On this basis, it held that the expiration of the 1967 leasehold in 1972 without discovery, production or delivery of gas did not abrogate petitioner's obligation under Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), to continue its certificated service by delivering that gas when it became available in 1975.[2]

[2] Petitioner is now complying with the Commission's directive pursuant to a protective order (Pet. App. B). This order provides that deliveries to Arkla by petitioner do not constitute a dedication to interstate commerce until it is judicially determined that Arkla is entitled to that gas under the certificate and the 1970 contract. If it is ultimately determined, however, that Arkla is not entitled to the gas, "Arkla [is] to respond in the nature of money damages or to repay the gas in kind" (Pet. App. B-4).

3. The court of appeals affirmed (Pet. App. A-1 to A-9), primarily relying on this Court's decision in *California* v. *Southland Royalty Co.*, 436 U.S.C. 519, 525 (1978). The court reasoned as follows (*id.* at A-7 to A-8):

> *Southland, inter alia*, stands for the following: (1) the initiation of interstate service pursuant to a certificate of public convenience and necessity dedicates all fields subject to that certificate; (2) once gas begins to flow in interstate commerce from a field subject to a certificate of unlimited duration, that flow cannot be terminated unless the Commission authorizes an abandonment of such service; and (3) the expiration of a lease on a field of gas does not affect the obligation to continue the flow of gas, a service obligation imposed by the Natural Gas Act.
>
> Applying these principles to the facts of the instant case, we find: (1) when [petitioner] instituted delivery of gas to Arkla in November, 1971, pursuant to its gas purchase contract with Arkla and under the authority of its certificate of public convenience and necessity, such constituted a dedication of all fields subject to the contract and authorized by the certificate, which would include the gas reserves in the [1967 leasehold] * * *; (2) gas having begun to flow in November, 1971, from a field subject to a certificate of unlimited duration, such flow could

not thereafter be terminated unless the Commission authorized such; and (3) the expiration in September, 1972, of the 1967 oil and gas lease * * * did not affect the obligation to continue the flow of gas from the field subject to the gas purchase contract, since the service obligation is imposed by the Natural Gas Act independently of property law.[3]

ARGUMENT

Petitioner argues that it did not violate its service obligation to deliver gas to Arkla since all that Arkla was entitled to under the 1970 contract and the certificate "was a dedication of any gas found during the term of each of the described leases" (Pet. 9), and not, as was the case here, gas "acquired after the leases covered by the contract expire[d]" (Pet. 10). This contention was correctly rejected by the court below and no further review by this Court is warranted.

As properly found both by the Commission (Pet. App. C-17 to C-18) and by the court of appeals (Pet. App. A-8 to A-9), the gas in issue had been dedicated to interstate commerce by the occurrence of two events which predated the 1972 lease: (1) the granting by the Commission of the certificate of public convenience and necessity covering all reserves (including those subject to the 1967 leasehold) committed to the 1970

[3] Judge Barrett concurred on the ground that petitioner, in succeeding itself as lessee in 1972, took the acreage subject to the earlier dedication (Pet. App. A-9 to A-10).

contract; and (2) the sale by petitioner, in November 1971, of gas from a field covered by the contract and the certificate. Under the Natural Gas Act, that certificated sale constituted a dedication to interstate commerce of the gas reserves included in the 1967 leasehold, and petitioner therefore could not, without the Commission's approval, abandon its service obligation by refusing to deliver to Arkla gas subsequently produced from those reserves.

Properly viewed, petitioner's claim here amounts to no more than a variation of an argument recently rejected by this Court in both *California* v. *Southland Royalty Co.*, *supra*, and *United Gas Pipe Line Co.* v. *McCombs*, No. 78-17 (June 18, 1979). In *Southland*, the Court held that a service obligation established under the Natural Gas Act, as manifested by a certificate of unlimited duration, survived the expiration of a lease covering the land in question. In so ruling, the Court "expressly agreed with the Commission that the 'initiation of interstate service pursuant to the certificate [of public convenience and necessity] *dedicated all fields subject to that certificate.*' 436 U.S. at 525 (emphasis added)." *United Gas Pipe Line Co.* v. *McCombs*, *supra*, slip op. 12-13.[4] Here, too, the initiation of interstate service pursuant to the certificate dedicated all fields subject to the certificate—including the 1967 leasehold.

[4] In *McCombs*, *supra*, this Court relied upon a similar analysis in holding that a gas producer may not abandon a service obligation without Commission approval once gas has been dedicated to interstate commerce.

Any other conclusion would ignore the fundamental public policy concerns underlying the Act. To permit the terms of petitioner's contract to control the scope of its service obligations under the Act, as petitioner would have it (Pet. 9-10), would allow producers "to make arrangements that would circumvent the ratemaking and supply goals of the statute." *Southland Royalty Co., supra,* 436 U.S. at 526. In sum, to uphold petitioner's claim "would enable private parties to circumvent the Commission's authority over abandonments" and thus "conflict with basic policies underlying the Act." *United Gas Pipe Line Co.* v. *McCombs, supra,* slip op. 8.[5]

[5] Petitioner argues further (Pet. 10-11), that the decision below is inconsistent with the Tenth Circuit's earlier opinion in *Wessely Energy Corp.* v. *Arkansas Louisiana Gas Co.*, 593 F.2d 917 (1979). To the extent that a conflict may be said to exist within the Tenth Circuit on this issue, such a conflict is a matter for that court to resolve, and provides no basis for this Court to exercise its certiorari jurisdiction to review the issue. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Nor is there merit to petitioner's final argument (Pet. App. 12) that the decision of the court below conflicts with opinions of the Third and Fifth Circuits. Those opinions dealt with questions of contract interpretation. That is not at issue here, as petitioner admits (Pet. 4) that its 1970 contract with Arkla covered the 1967 lease.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ROBERT R. NORDHAUS
General Counsel

JEROME M. FEIT
JOSHUA Z. ROKACH
Attorneys
Federal Energy Regulatory Commission

JANUARY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 308827 196